IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. _____

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA
FINANCE CORPORATION,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEROME B. ROSENTHAL
250 North Canon Drive
Beverly Hills, California 90210
(213) 272-5436
In Propria Persona, Petitioner

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TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE UNITED
STATES SUPREME COURT:

Petitioner respectfully petitions this Honorable Court for a writ of certiorari to review a judgment of the Court of Appeal, of the State of California, Second Appellate Distric Division Four, which judgment became final upo denial of a hearing by the California Supreme Court March 1, 1972.

OPINIONS BELOW

The California Supreme Court did not render an opinion upon denial of petitioner's Petition for Hearing. A copy of said denial is annexed hereto as Appendix A.

A copy of the opinion of the Court of Appeal of the State of California, certified for non-publication, is annexed hereto as Appendix B. Said opinion was entered January 3, 1972. A Petition for Rehearing to said Court was denied January 19, 1972. A copy of said denial is annexed hereto as Exhibit C.

A copy of the Judgment of the California trial court, the Superior Court of the State of California in and for the County of Los Angeles is annexed hereto as Appendix D. Said judgment purported to give full faith and credit to the Default Order and Judgment of the original trial court, i.e., Clark Circuit Court of the State of Kentucky. Said Default Order and Judgment is annexed hereto as Appendix E. None of the foregoing opinions are published in any official or unofficial reports.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1257(3) which reads in relevant part:

OPINIONS BELOW

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . ."

Petitioner has been denied due process of law in violation of the 14th Amendment of the United States Constitution. The final action of the state courts was the denial of the Petition for Hearing by the California Supreme Court, March 1, 1972. This petition was filed within 90 days thereafter. 28 U.S.C. Section 2101(C).

QUESTIONS PRESENTED FOR REVIEW:

---

(1) Whether the due process clause is violated where a default judgment is entered granting greater or different relief than specified and sought in the complaint and prayer.

(2) Expressed in another manner, is the due process clause violated:

- where the defendant has not been personally served with process (summons),

- where the prayer specifically states that no personal judgment is sought against those defendants not personally served with process (summons),

- where the defendant relies on the specific demands of the complaint's prayer, and therefore defaults and does not contest on the merits, and

- a judgment in personam is entered against that defendant (assuming the court has personal jurisdiction).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment 14, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves a fundamental question of due process. Petitioner was a limited partner in two limited partnerships which were engaged in the oil business in Kentucky. At all times mentioned Petitioner was and is a California resident,and Petitioner has never had so called "minimum contacts" with Kentucky on account of the partnership dealings there, or otherwise.

The limited partnerships entered into a contract and security agreement with Respondent's assignor. Both the general partner, and the remaining limited partners, personally guaranteed said contract and security agreement.

Respondent commenced an action in Kentucky, naming as parties defendant the limited partnerships as entities and the general and limited partners individually.

The Kentucky complaint sounded quasi in rem; it is annexed hereto as Appendix F. It prayed for adjudication, under the contract and Security Agreement, that

- "Defendants and each of them are indebted to Plaintiff in the principal sum of . . . ," plus interest (Appendix F, p. 30 at A),

- Plaintiff "is the owner" of the property (Security)(Appendix F, p. 30 at B),

- Defaults existed, and Plaintiff was entitled to remove and sell the property (Security), and apply proceeds against Defendant's indebtedness (Appendix F, pp. 35, 36 at D).

- Defendants and each of them are indebted to Plaintiff for a reasonable "attorney's fee. . . ." (Appendix F, p. 36 at G).

The Kentucky complaint also prayed for:

- "personal judgment in said" (principal and interest) "amounts against each Defendant who is personally served with Summons herein" (emphasis added) (Appendix F, p. 35 at A), and

- "personal judgment in said" (attorney's fee) "amount against all Defendants who are personally served with Summons herein (emphasis added)(Appendix F, p. 36 at G).

It is an undisputed fact that Petitioner was never personally served with Summons. Obviously the plain effect of the Prayer is the seeking of personal judgments only against defendants who were personally served with Summons.

Notwithstanding the foregoing limitations the Kentucky court entered its Default Order and Judgment (Appendix D) awarding a "Personal Judgment . . . against Defendants and each of them, jointly and severally." Thus, the Kentucky Court entered a Default Judgment in personam against Petitioner (who was never

personally served with Summons), although the prayer, in two distinct places, sought personal judgment(s) only against Defendants who were "personally served with Summons."

Before issuing its judgment, the Superior Court in and for the County of Los Angeles determined that the Kentucky court had obtained personal jurisdiction over Petitioner, since an attorney who had been hired by the general partner filed a noticed motion which was determined to be a general appearance binding Petitioner according to Kentucky law.

Even supposing that the Kentucky court had personal jurisdiction over Petitioner, the Default Order and Judgment of the Kentucky court entered for failure to file answer cannot properly or validly grant a personal judgment, on default. As above set forth, the prayer expressly does not seek a personal judgment against any defendant who, like Petitioner, was not served with Summons.

Expressed in another way, the defendant is subject only to such a judgment as the complaint demands of him. Any greater or different relief by Default Judgment is unauthorized. The defendant who decides to default is entitled to rely on the specific demands of the Prayer.

This position was presented to the Court of Appeal, highlighted in the Supplement to Appellant's Brief, i.e., December 17, 1971

letter to the Court of Appeal (Appendix G) and included in the Petition for Hearing to the California Supreme Court.

The Court of Appeal did not in any way consider or deal with this important and fundamental question of due process, in its decision.

The California courts gave full faith and credit to a judgment rendered beyond the Kentucky court's power to exercise its jurisdiction and thereby denied Petitioner due process of law.

ARGUMENT

As set forth in Standard Oil Co. v. State of Missouri, 224 U.S. 270 at 281, 32 S.Ct. 406, 56 L.Ed. 760 (1911).

> "The federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the 14th Amendment they were entitled to notice and the opportunity to be heard. That necessarily required that the notice and the hearing should be appropriate to that which has been heard and determined on such notice. For even if a court has original jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment

which is beyond the claim asserted, or which in its essential character is not responsive to the cause of action on which the proceeding was based" (emphasis added).

This above proposition is settled case law. As stated in Sylvan Beach v. Koch, 140 F. 2d 852 at 861 (1944).

> "A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. . . .
>
> "Unless all parties in interest are in court and have voluntarily litigated some issues not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of relief demanded. . . ." (Emphasis added.)
>
> "The foregoing rules are all fundamental and state nothing more than the essentials of due process and fair play. They assure to every person his day in court before judgment is pronounced against him. . . ."

This fundamental principal of law is again restated thusly:

> "The judgment may not go beyond a determination of the issues presented in the pleadings nor the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest on the basic principles of our jurisprudence that no man shall be deprived of his life, liberty, or property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the judgment sought." Gentry v. U.S., 101 F. 51 (8th Cir. 1900).

The prayer in the instant case specifically did not seek in personam relief against defendants who were not personally served.

Another case supporting the position advanced by Petitioner is Windsor v. McVeigh, 93 U.S. 274 at 282, 23 L. Ed. 914, 917 (1876) wherein it is stated:

> "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the powers conferred by law. If, for instance, the action be upon a money demand, the court has not power to pass judgment of imprisonment in the

penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order a specific performance of a contract. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court, in rendering them would transcend the limits of its authority in the cases."

The same considerations are directly applicable here.

California should not have purported to give full faith and credit to an invalid judgment. The following quotations from Reynolds v. Stockton 140 U.S. 254, 7 S.Ct. 773 (1891) are highly relevant:

The full faith and credit clause does not,

". . . demand that a judgment rendered in a court of one state . . . which has jurisdiction of the person but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. The requirements of that section are fulfilled when a judgment rendered in a court of one state, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is

apparent that the defeated party was in fact heard on the matter determined (Emphasis added) is recognized and enforced in the courts of another state.

"If the fact of a judgment rendered in a court of one state does not preclude inquiry in the courts of another, as to jurisdiction of the court rendering the judgment over the person or the subject matter, it certainly also does not preclude inquiry in the courts of another, as to whether the judgment so rendered in a court of one state was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court so rendering it. Take an extreme case: Given a court of general jurisdiction, over actions of ejectment as well as those of replevin; a complaint in replevin for the possession of certain specific property, personal service on the defendant, appearance of the defendant, appearance and answer denying title. Could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not, even in the courts of the same state. If not there, the constitutional provision

quoted gives no greater force to the same record in another state."

". . . [w]ithout amendment of the pleadings, a judgment for the recovery of possession of real estate, rendered in an action whose pleadings discloses only a claim for the possesion of personal property, cannot be sustained, although (Emphasis added) personal service was made upon the defendant."

"The invalidity of the judgment depends upon the fact that it is no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language, must be responsive to all matters controverted."

"Here there was no appearance after the filing of the answer. . . ."

". . . [T]he rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

"A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received

> much judicial consideration. . . . It is impossible to concede that because A and B are parties to a suit that a court can decide any matter, in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises."

IMPORTANT REASONS FOR THE ALLOWANCE OF THE WRIT

As above indicated, the question presented has not received much judicial consideration. Nevertheless it is obvious that this question is in fact fundamental. The Reynolds case, supra, was decided in 1891 and yet the concepts there enumerated are of vital significance today. The due process clause does require that when a party does not in fact have a meaningful opportunity to be heard, since he relied on the specific conditions limiting and excluding in personam judgment against him contained in the pleadings and prayer, no such judgment may issue against that party. This Honorable Court should seize this opportunity not only to

ameliorate a personal injustice to Petitioner but to once again reiterate and reestablish "the basic principle of our jurisprudence that no man shall be deprived of life, liberty or property . . . " without being given "to the parties to be affected an opportunity to be heard respecting the judgment sought" Gentry v. U.S., 101 F. 51 (8th Cir. 1900).

Respectfully submitted,

JEROME B. ROSENTHAL

In Propria Persona,
Petitioner

APPENDIX A

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

Mar. 1 972

HEARING DENIED

In re: 2 Civ. No. 38062

Arkansas Louisiana Finance Corporation

vs.

Rosenthal

Respectfully,

G. E. Bishel
Clerk

APPENDIX B

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ARKANSAS LOUISIANA FINANCE CORPORATION,	) Civ. No. 38062) (Sup. Ct.) No. 961867)
Plaintiff and Respondent,	)
vs.	)
J. B. ROSENTHAL,	)
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Los Angeles County. Emil Gumpert, Judge. Affirmed.

Sigelman & Stein, Paul S. Sigelman and Jerome B. Rosenthal, in propria persona, for Defendant and Appellant.

Donald F. Yokaitis for Plaintiff and Respondent.

This is an appeal by defendant, Jerome Rosenthal, from a judgment for plaintiff in an action to enforce a foreign judgment for the payment of money. (Code Civ. Proc. § 1913.)

In the verified complaint, filed September 25, 1969, it was alleged: on January 20, 1969 the Clark Circuit Court of the State of Kentucky, a court of general jurisdiction, rendered a personal default judgment for $106,275.96 in favor of plaintiff and against defendants, jointly and severally. The defendants included Jerome Rosenthal, a resident of California, both individually and as a limited partner in two limited partnerships which were codefendants. Pursuant to a post-judgment order, certain equipment belonging to the partnerships was sold by plaintiff and the proceeds of the sale were credited against the judgment. Except for this credit, no part of the judgment had been paid, and there remained due thereon $93,965.12. Plaintiff sought a judgment in this amount against Rosenthal.

On October 27, 1969 defendant filed an answer admitting rendition of the Kentucky judgment against him "as set forth in the complaint," and praying that the court determine "the exact amount due from him to the plaintiff." On November 4, 1969 he filed a verification of his answer. On February 9, 1970 defendant moved to amend the answer to allege as an affirmative defense that the personal judgment against him was a deficiency judgment

barred by Code of Civil Procedure §§580b and 580d. 1/

On February 17, 1970 plaintiff filed points and authorities in opposition to defendant's motion to amend the answer. Plaintiff therein pointed out that the proposed affirmative defense constituted a collateral attack on a foreign judgment on grounds not permitted in California, the only valid ground of such an attack being lack of jurisdiction of the subject matter or the person, or excess of jurisdiction.

On February 20, 1970 defendant was permitted to file an "Amended First Amended Answer" setting forth as affirmative defenses that the action was barred by sections 580b and 580d, that the Kentucky court lacked personal jurisdiction of defendant, and that the court exceeded its jurisdiction in rendering a judgment against him for any amount in excess of the value of the security in the

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1/ The theory of this defense apparently was: the Kentucky action was based upon a note secured by a chattel mortgage or trust deed; therefore, the judgment in that action was in effect a deficiency judgment which is unenforceable in California because of the provisions of Code of Civil Procedure §§ 580b and 580d, prohibiting rendition of such a judgment in this state.

transaction which had given rise to the Kentucky lawsuit. 2/

On July 22 and 23, 1970 the action was tried without a jury. The following documents were received in evidence on behalf of plaintiff: (1) an exemplified copy of the Kentucky judgment; (2) an exemplified copy of a motion filed in the Kentucky action on February 28, 1968 by Marshall McCann, a Kentucky attorney, on behalf of all of the defendants. In this motion defendants had sought an order dismissing the complaint, for failure to allege facts upon which relief could be granted, and an order striking from the complaint the prayer for recovery of attorneys' fees.

Pursuant to stipulation, the court also received in evidence on behalf of plaintiff the deposition of attorney McCann taken in Kentucky on July 14, 1970. In his deposition McCann stated: in December 1964 he was employed by the limited partnerships to represent them in connection with the acquisition of oil and gas leases in Kentucky. In February 1968, after plaintiff filed the Kentucky action against the partnerships and Rosenthal, individually, McCann was appointed by the court as a "warning order attorney" for Rosenthal. (Under Kentucky procedure, in an action against a nonresident defendant the

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2/ See fn. 1.

court appoints a "warning order attorney" to notify the defendant of the pendency and nature of the action. The cout then issues a "warning order" in which defendant is "warned" to appear and answer within a specified period after entry of the order, and that unless he does so a default judgment in rem may be rendered in favor of the plaintiff.) In his capacity as warning order attorney, McCann sent Rosenthal a letter, dated February 5, 1968, advising him of the pendency of plaintiff's action. Enclosed were copies of the complaint and the warning order.

Upon receiving the letter and enclosures, Rosenthal telephoned McCann, asking "what it was all about." On that occasion McCann talked to Rosenthal to great length. They discussed McCann's contentions that defendants could strike the prayer for attorneys' fees from the complaint, but that they had no defense to the action. As a result of this conversation, McCann assumed he was employed to represent Rosenthal as an individual. In this regard he testified in his deposition: "I can't say that definitely Mr. Rosenthal employed me as his personal attorney but having represented all of them in their limited partnership I assumed I was representing all of them at that time. . . . Whether I was technically employed as Mr. Rosenthal's personal attorney I don't know that there was any conversation about that. I just assumed that I did." Following the telephone conversation with Rosenthal,

McCann filed the motion. Thereafter, he corresponded with Rosenthal and telphoned him from time to time concerning the progress of the lawsuit. Neither by letter nor telephone conversation did Rosenthal raise any question concerning McCann's representation of him.

Defendant Rosenthal testified in his own behalf as follows: He did not authorize or employ McCann to represent him, individually, in the Kentucky action. Neither McCann nor anyone else told Rosenthal that McCann represented him in his individual capacity. Rosenthal received a copy of the complaint which McCann sent him on February 5, 1968, but did not notice until some time thereafter that he, individually, was named as a defendant. When he telephoned McCann after receiving the complaint McCann told him he would file a motion, but Rosenthal did not recall what kind of motion it was. He did not tell McCann not to file the motion.

Rosenthal received a copy of the Kentucky judgment in January 1969. At that time he learned judgment had been rendered against him, personally. However, he did not contact McCann to protest that fact, or to ascertain how a personal judgment could have been rendered against him, because he believed the judgment was void for lack of personal jurisdiction inasmuch as he had not authorized McCann to file "any document on my individual behalf that might in any way be

construed as a general appearance or any appearance."

Rosenthal was served in September 1969 with copies of the summons and complaint in plaintiff's California action to recover judgment against him on the basis of the Kentucky judgment. His failure to plead the defense of lack of personal jurisdiction in his original answer to this complaint was allegedly due to "inadvertence." Between the filing of that answer (October 1969) and the filing of his amended first amended answer (February 1970) he testified that he telephoned McCann in an attempt to clarify the extent of McCann's authority to represent the defendants in the Kentucky action. In that conversation, McCann said, according to Rosenthal, that he recalled Rosenthal had not given him authority to represent Rosenthal, individually. He purportedly further told Rosenthal that the basis of the personal judgment against him was a general appearance which had resulted from McCann's signing and filing certain motions on behalf of all defendants; he indicated that he had signed these motions as "attorney for defendants" as a matter of habit, and did not mean to assert thereby that he had any authority to represent Rosenthal in his individual capacity.

Following Rosenthal's testimony, the court suggested on July 23, 1970, that McCann be further deposed concerning his authority to represent Rosenthal or that, in the alternative, McCann be brought to California to testify.

The trial thereupon was continued to July 30th. On that date, court and counsel had an informal discussion in chambers from which the court concluded that neither party insisted upon further deposing McCann or having him testify personally. Thereafter, in open court the parties agreed they were willing to forego either the oral deposition of McCann or obtaining his answers by written interrogatories, and to submit the matter.

On September 2, 1970 findings of fact and conclusions of law were signed and filed. The court found: the Clark Circuit Court of Kentucky is a court of general jurisdiction; defendant authorized McCann to act as his attorney, and all acts of McCann as such attorney were "confirmed, ratified, acknowledged and consented to by Defendant without any protest or reservation whatsoever"; on or about February 27, 1968 the Kentucky court acquired personal jurisdiction of defendant when he, through his attorney McCann, filed a written motion which constituted a general appearance; the Kentucky judgment in favor of plaintiff and against defendant was a valid, final in personam judgment; none of the affirmative defenses pleaded in the amended answer was valid; after the deduction of all credits from the amount of the Kentucky judgment, there remained due and unpaid thereon the principal sum of $93,190.58,[3/] plus interest. From these

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[3/] This sum, which was less than that sought in the complaint ($93,965.12), was the amount shown to be due by plaintiff's accounting records, received in evidence.

findings the court concluded the Kentucky judgment was entitled to full faith and credit, and that plaintiff was entitled to judgment against defendant.

On September 3, 1970 judgment for the principal sum of $93,190.58, plus $8,364.17 interest, was entered in favor of plaintiff and against defendant.

On September 10th defendant moved for a new trial on the grounds of irregularity in the proceedings of the court, surprise, newly discovered evidence, insufficiency of the evidence to justify the judgment, and that the judgment was against law. (Code Civ. Proc. § 657, subds. 1, 3, 4, 6.) On October 9th the motion was argued and denied.

Defendant appeals from the judgment, contending (1) there was no substantial evidence to support the finding that defendant authorized McCann to represent him, and (2) the trial court should have granted a new trial on the ground of surprise.[4/]

4/ While no appeal lies from an order denying a motion for new trial (Code Civ. Proc. § 904.1) an appellate court can review such order on appeal from a judgment (Code Civ. Proc. § 906).

I. McCann's Authority To Represent Defendant, Individually

The motion of February 28, 1968 to dismiss and to strike part of the complaint, filed by McCann on behalf of all defendants in the Kentucky action, constituted a general appearance (Judson v. Superior Court, 21 Cal. 2d 11, 13 [1942], overruled on other grounds in Goodwine v. Superior Court, 63 Cal. 2d 481, 484-485 [1965]; MacPherson v. Superior Court, 22 Cal. App. 2d 425, 430 [1937]; Commonwealth Life Ins. Co. v. Combs, 65 S. W. 2d 696, 698 [Ky. App. 1933]; Johnson v. Holt's Adm'r, 31 S. W. 2d 895, 896-897 [Ky. App. 1930]; Martin v. Cole, 230 S. W. 535 [Ky. App. 1921] which conferred personal jurisdiction over the defendants. Dresser v. Superior Court, 231 Cal. App. 2d 68, 76 [1964]; Crabtree v. Superior Court, 197 Cal. App. 2d 821, 827 [1961]; Greene v. Commonwealth, 122 S. W. 2d 523, 527 [Ky. App. 1938]; Hudson v. Manning, 63 S. W. 2d 943, 945 [Ky. App. 1933].) The personal default judgment based upon such jurisdiction was subject to collateral attack in this action on the ground McCann was not authorized to enter an appearance for defendant Rosenthal, incividually. (Cagnon Co., Inc. v. Nevada Desert Inn, 45 Cal. 2d 448, 457 [1955].) However, both in California and Kentucky there is a presumption that an attorney entering the appearance of a defendant has authority to do so. (Voinich v. Rolleri, 203 Cal. 379, 382 [1928]; Sullivan v. Dunne, 198 Cal. 183, 190

[1926]; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 8 [1903]; Garrison v. McGowan, 48 Cal. 592, 600 [1874]; Wilson v. Barry, 102 Cal. App. 2d 778, 780 [1951]; Jones v. Baxter, 51 Cal. App. 589, 594 [1921]; Sachs v. Title Ins. & Trust Co., 202 S. W. 384, 386 [Ky. App. 1947]; King Const. Co. v. Mary Helen Coal Corp., 239 S. W. 799, 800 [Ky. Spp. 1922].) The presumption is disputable (Evid. Code §§ 601, 605) but the party denying the attorney's authority has the burden of proving lack of authority by a preponderance of the evidence. (Evid. Code §§ 115, 606, 660, 666; Garrison v. McGowan, supra, 48 Cal. at p. 600; Hicks v. Hicks, 264 Cal. App. 2d 890, 895 [1968]; Kallman v. Henderson, 234 Cal. App. 2d 91, 98 [1965]; Wilson v. Sharp, 175 Cal. App. 2d 691, 695 [1959]; Dale v. City Court of Merced, 105 Cal. App. 2d 602, 608 [1951]; People v. Western Meat Co., 13 Cal. App. 539, 545 [1910]; 6 Cal. Jur. 2d Rev. 121, "Attorneys at Law" § 66.)[5/]

Defendant Rosenthal attempted to sustain this burden by testifying that he did not employ or authorize McCann to represent

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5/ The law of the forum governs proof of facts. (Estate of Winder, 98 Cal. App. 2d 78, 84 [1950]; Restatement of the Law 2d, Conflict of Laws 365-366, 374 §§ 133, 135.)

him, individually. However, no formal contract is necessary to create the relationship of attorney and client.[6] (Brydonjack v. Rieck, 5 Cal. App. 2d 219, 222-223 [1935]; see also Arden v. State Bar, 52 Cal. 2d 310, 315 [1959].) The rules governing the attorney-client relationship are founded on the rules governing the relation of principla and agent. (Moving Picture etc. Union v. Glasgow Theaters, Inc., 6 Cal. App. 3d 395, 403 [1970]; Fidelity & Casualty Co. v. Abraham,

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[6] On this appeal, neither party discusses the conflict of laws question: Whether California or Kentucky law governs as to the creation of an attorney-client relationship between McCann and defendant. As a general rule, the law of the place of contracting determines the formalities required for the making of a contract, and the place where the offer is accepted is the place of contracting. (Smith v. Harris, 127 Cal. App. 2d 311, 314 [1954].) However, the record does not disclose facts sufficient to permit application of this rule to resolve the conflict of laws question. Under these circumstances, we are entitled to assume California law governs. (Wells v. Wells, 74 Cal. App. 2d 449, 453 [1946]; Rogers v. Rogers, 49 Cal. App. 2d 366, 370-371 [1942]; 11 Cal. Jur. 2d 86, "Conflict of Laws" § 22.)

70 Cal. App. 2d 776, 783 [1945].) The creation of an agency does not depend upon express appointment and acceptance thereof, but may be implied from the words and conduct of the parties and the circumstances of the particular case. (Ferroni v. Pacific Finance Corp., 21 Cal. 2d 773, 779 [1943]; Smith v. Schuttpelz, 1 Cal. 2d 158, 161 [1934]; Whiteman v. Leonard Realty Co., 189 Cal. App. 2d 373, 376 [1961]; Ramey v. Myers, 111 Cal. App. 2d 679, 685 [1952].)

We review the evidence in the light of these principles, bearing in mind that all conflicts must be resolved in favor of respondent-plaintiff and all legitimate inferences must be indulged to uphold the finding that defendant authorized McCann to act as his attorney. (Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 429 [1935]; Straub v. Straub, 213 Cal. App. 2d 792, 797 [1963].)

Before plaintiff filed the Kentucky action, McCann had represented the limited partnerships and all of the partners in other matters. Therefore, when defendant telephoned him regarding plaintiff's action against the partnerships and defendant, McCann not unreasonably assumed he had authority to represent defendant, both as a parnter and individually. During their telephone conversation, defendant and McCann discussed defenses to the action, and the possibility of having the prayer for attorneys' fees stricken from the complaint. McCann told defendant he would file a motion, and defendant did not tell McCann not to do so. After

this conversation, McCann filed the motion seeking an order striking attorneys' fees and other relief. He then corresponded with defendant and telephoned him several times regarding the progress of the action, but defendant never raised the question of McCann's authority to represent him. Defendant testified he did not notice until some time after receiving a copy of the complaint that he was being sued in his individual capacity.[7/] From the evidence outlined it is inferable that McCann had actual authority to represent defendant because defendant, by want of ordinary care, allowed him to believe he had such authority. (Civ. Code §2316.)

We conclude there was sufficient evidence to support the finding. Defendant's testimony that he did not authorize McCann to represent him merely created a conflict in the evidence, and all questions as to conflict and preponderance of evidence are for the trial court. (Beeler v. American Trust Co., 24 Cal. 2d 1, 7 [1944]; Wadleigh v. Phelps, 149 Cal. 627, 637 [1906].) "An appellate court

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7/ At a hearing to settle the proposed findings, the trial court commented: "The court did not and does not accept the testimony of Mr. Rosenthal. It is full of contradictions and weaknesses, and if I can use the expression often used by lawyers, it is full of holes."

has no right to retry a case on the facts. Our whole duty as to the factual showing is to determine whether there is substantial evidence to support the conclusion of the trier of fact even though there is contrary evidence equal to, or even greater than, that which favors the trial court's decision. We cannot weigh the evidence, or pass upon the credibility of the witnesses." (Kallman v. Henderson, supra, 234 Cal. App. 2d at p. 96.)

Since there was sufficient evidence of prior authorization, it was not necessary to establish ratification of McCann's acts by defendant. (Civ. Code § 2307.) However, the finding of ratification likewise is supported by the evidence. Ratification may be established by implication from conduct of the purported principal which is inconsistent with any reasonable intention on his part, other than that he intends approving and accepting the act of the purported agent. (Ballard v. Nye, 138 Cal. 588, 597 [1903]; Ralphs v. Hensler, 97 Cal. 296, 302-303 [1893], overruled on other grounds in Flores v. Arroyo, 56 Cal. 2d 492, 497 [1961]; Ford v. Lou Kum Shu, 26 Cal. App. 203, 211 [1914].) A ratification cannot take place until the principal is in full possession of all the material facts. (Promis v. Duke, 208 Cal. 420, 427 [1929]; Broecker v. Moxley, 136 Cal. App. 248, 254 [1934].) However, where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man on inquiry, he may be held to have ratified despite lack of full knowledge. (Hutchinson Co.

v. Gould, 180 Cal. 356, 358 [1919]; Ballard v. Nye, supra, 138 Cal. at p. 598; Reusche v. California Pac. Title Ins. Co., 321 Cal. App. 2d 731, 737 [1965]; Volandri v. Hlobil, 170 Cal. App. 2d 656, 659 [1959].)

When defendant received a copy of the personal default judgment against him in January 1969, he was put on notice that the Kentucky court had acquired personal jurisdiction over him, or at least believed that it had such jurisdiction. However, he did not then contact either McCann or plaintiff's attorneys to question the judgment or object to it. It was not until some time after the California action was filed (September 1969) that he finally telephoned McCann to ask how personal jurisdiction could have been acquired. He testified that he then learned, for the first time, that in February 1968 McCann had signed and filed a motion which constituted a general appearance. Only after this did defendant challenge entry of the appearance by the filing of an amended answer (February 1970) containing the affirmative defense of lack of personal jurisdiction. Under these circumstances, defendant may be held to have ratified in January 1969 McCann's act of entering the general appearance even though he testified that he did not actually learn of that appearance until almost a year later.

II. Trial Court's Refusal To Grant New Trial On Ground Of Surprise

Defendant bases his claim of surprise on the contention that after the trial court suggested McCann be further deposed, the court suddenly "reversed" that position and immediately rendered a decision from the bench without benefit of a further deposition. Defendant asserts he was thereby "legally surprised" and "trapped," and hence a new trial should have been granted on the ground of surprise.

The record shows: upon conclusion of defendant's testimony on July 23, 1970, the court suggested that McCann be further deposed, and continued the trial to July 30th. When counsel returned to court on that date, the following proceedings were had:

"THE COURT: The court and counsel had an informal discussion in chambers a few moments ago and the court gathers from that discussion that neither the plaintiff nor the defendant is insisting upon taking the deposition of Mr. McCann and that each side is willing to submit the matter to the court on the record as now made. Is that correct, gentlemen?

"MR. YOKAITIS: That is correct, your Honor.

"MR. ROSENTHAL: That is correct, your Honor.

"THE COURT: If you want the deposition, Mr. Rosenthal, I don t want to foreclose you . . . . You are both agreeable to submitting the matter now to the court?

"MR. YOKAITIS: I submit it.

"MR. ROSENTHAL: That is correct, I am also, your Honor."

"Surprise" as a ground for a new trial denotes some situation in which a party to an action is unexpectedly placed to his injury, without any negligence on his part. (Wade v. De Bernardi, 4 Cal. App. 3d 967, 971 [1970].) Where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable decision. He must act at the earliest possible moment, for the right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court and no motion is made for a continuance or other relief. (Kauffman v. De Mutiis, 31 Cal. 2d 429, 432 [1948]; Schellhous v. Ball, 29 Cal. 605, 608 [1866]; Stanley v. Feather River Pine Hills, 112 Cal. App. 2d 101, 104 [1942]; Noble v. Tweedy, 90 Cal. App. 2d 738, 742-743 [1949]; Baker v. Berreman, 61 Cal. App. 2d 235, 241 [1943].) If defendant was surprised by the court's action on July 30th, he did not then so indicate but, on the contrary, expressly consented to submitting the matter without the deposition of McCann. He waited until after findings were signed and judgment entered, and then on September 10th filed a motion for new trial on several grounds, including surprise.

The granting or denial of a motion for new trial on the ground of surprise is a matter within the discretion of the trial court, and its determination will not be disturbed unless that discretion has been abused. (Kauffman v. De Mutiis, supra, 31 Cal. 2d at pp. 433-434; South Santa Clara etc. Dist. v. Johnson, 231 Cal. App. 2d 388, 407 [1964]; Adoption of Curtis, 195 Cal. App. 2d 179, 184 [1961].) In view of the circumstances, we cannot say the court abused its discretion in denying the motion for new trial.

The judgment is affirmed.

NOT FOR PUBLICATION.

DUNN, J.

We concur:

JEFFERSON, Acting P. J.

KINGSLEY, J.

APPENDIX C

Los Angeles, Cal. Jan 19 19 72

TITLE (Arkansas Louisiana Finance Corp.) vs. (Rosenthal) No. 38062

THE COURT:

PETITION FOR REHEARING DENIED.

Clay Robbins, Clerk

Clerk's Office
Court of Appeal
Second District
California State Building, Room 1201
Civic Center
Los Angeles, Calif. 90012

620-3180

Sigelman & Stein

250 North Canon Drive

Beverly Hills, Calif. 90210

APPENDIX D

William G. Sharp, County Clerk
Entered Book Page
Sep 3 70 6571 308

Filed
Sep 2 1970
Wiliam G. Sharp, County Clerk
By /s/ Miyahara
Deputy

SUPERIOR COURT OF THE STATE
OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ARKANSAS LOUSIANA FINANCE CORPORATION, Plaintiff, vs. J. B. ROSENTHAL, Defendant.	No. 961 867 JUDGMENT

The above entitled action came on regularly for tiral on July 22, 1970 in Department 35 of the above entitled court, the Honorable Emil Gumpert, Judge presiding without a jury, and was regularly tried on said date and on July 23, 1970. Plaintiff appeared by Donald F. Yokaitis, Esq. and Defendant appeared by Rosenthal & Leon, Attorneys at Law by Jerome B. Rosenthal, Esq.

The court, having heard the oral testimony and examined the documentary evidence introduced

by the parties, the cause having been submitted for decision and the court, after hearing arguments of counsel, reading the Points and Authorities of counsel, being fully advised in the matter, the court, having announced its intended decision in favor of Plaintiff and against Defendant, J. B. ROSENTHAL, and the court, having made and caused to be filed its written Findings of Fact and Conclusions of Law:

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff, Arkansas Louisiana Finance Corporation, a corporation is granted judgment against Defendant, J. B. Rosenthal, also known as Jerome B. Rosenthal in the sum of $93,190.58 plus interest thereon at the rate of 7% per annum from May 22, 1969 through September 2, 1970 amounting to $8,364.17, making a total sum of $101,554.53.

2. Plaintiff, Arkansas Louisiana Finance Corporation, a corporation, shall have their costs of suit herein in the sum of $97.65.

THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

DATED: September 2, 1970.

/s/ Emil Gumpert
EMIL GUMPERT, Judge
Superior Court

APPENDIX E

CLARK CIRCUIT COURT

ARKANSAS LOUSIANA FINANCE CORPORATION, A CORPORATION — PLAINTIFF

VS.

DEFAULT ORDER AND JUDGMENT

CIVIL ACTION
NC. 11-463

TOM ATKINS LINE CO., LTD., (d/b/a "MOAR LINE CO., LTD."), A LIMITED PARTNERSHIP COMPRISED OF TERRENCE P. MELCHER AS EXECUTOR OF THE ESTATE OF MARTIN MELCHER, DECEASED, AND J. B. ROSENTHAL AS LIMITED PARTNERS AND T. E. ATKINS AS THE GENERAL PARTNER; TOM ATKINS, PRODUCING CO., LTD., (d/b/a/ "MELCHER-ATKINS OIL") A LIMITED PARTNERSHIP COMPRISED OF TERRENCE P. MELCHER AS EXECUTOR OF THE ESTATE OF MARTIN MELCHER, DECEASED, AND J. B. ROSENTHAL AS LIMITED PARTNERS AND T. E. ATKINS AS THE GENERAL PARTNER, AND TERRENCE P. MELCHER AS EXECUTOR OF THE ESTATE OF MARTIN MELCHER, DECEASED J. B. ROSENTHAL AND T. E. ATKINS, INDIVIDUALLY — DEFENDANTS

* * * * *

This cause coming on to be heard, and it appearing to the Court that the defendants named in

the caption hereinabove, and each of them, have been duly served with Summons for a period of more than twenty (20) days last past and that defendants, and each of them, are now in default in the filing of any answer, motion or other pleading to the complaint filed herein as amended and the Court being advised, IT IS HEREBY ORDERED AND ADJUGED AS FOLLOWS:

1. Plaintiff is hereby awarded a personal judgment against defendants named in the caption, and each of them, jointly and severally

a) in the sum of Seven Thousand One Hundred Eighty Five Dollars and Fifty Nine Cents ($7,185.59) together with interest thereon at the rate of seven (7%) percent per annum from December 21, 1967, until paid; and

b) in the sum of Ninety Nine Thousand Ninety Dollars and Thirty Seven Cents ($99,090.37) together with interest thereon at the rate of seven (7%) percent per annum from December 31, 1967, until paid; and

2. Until the amount of the judgment awarded to Plaintiff herein is paid in full, Plaintiff is adjudged to be the owner of 12.375 percent (15 percent of 82.5 percent, the 82.5 percent being the so-called "working interest") of the gross proceeds payable by United Fuel Gas Company under a certain contract as supplemented, modified and amended, between said United Fuel Gas Company and Defendant

MOAR LINE CO., LTD., and Defendants Terrence P. Melcher as Executor of the Estate of Martin Melcher, deceased, and T. E. Atkins, partners doing business under the firm name of Melcher-Atkins Oil, said agreement being dated August 19, 1964, and within ten (10) days after entry of this Judgment, Defendants are hereby ordered and directed to forward an attested copy of this Default Order and Judgment to United Fuel Gas Company with written instructions to United Fuel Gas Company to make payment of 12.375 percent of the gross proceeds payable under the aforesaid contract to Plaintiff herein until said United Fuel Gas Company is notified in writing by Plaintiff that this Judgment has been fully paid and satisfied.

3. Plaintiff is the owner of the following described compressor equipment:

> "Three (3) skid-mounted Worthington Model HB two-cylinder, two-stage, 240 HP natural gas compressors, each driven by a Caterpillar Model G-342 turbocharged and aftercooled six-cylinder natural gas prime mover. Equipment common to each compressor to be one (1) 12-3/4" C. D. inlet srubber one (1) 10.3/4" C. D. second-stage auction scrubber, Model 6V Disler Cooler, and other equipment necessary to make such machine a self-contained unit.

UNIT NO. 1

Engine Serial No. 71B350

6½" compressor: Frame No. 179231, cylinder No. 178323

5½" compressor: Frame No. 179230, cylinder No. 178490

Disler Cooler No. 4725

UNIT NO. 2

Engine Serial No. 71B356

6½" compressor: Frame No. L79263, cylinder No. L77939

5½" compressor: Frame No. L79196, cylinder No. L79263

Disler Cooler No. 4726

UNIT NO. 3

Engine Serial No. 71B354

6½" compressor: Frame No. 179267

5½ compressor: Frame No. 179197

Disler Cooler No. 4727."

The aforesaid items of equipment are presently located in the Trapp Field, Clark County

Kentucky, and Defendants and each of them are hereby ordered and directed to assemble said equipment and deliver the same to Plaintiff at the nearest point on the nearest public road not later than ten (10) days after the date of entry of this Default Order and Judgment. All expenses involved in assembling and delivering said equipment to Plaintiff shall be borne and paid for by Defendants.

4. Upon delivery of said items of equipment to Plaintiff the same shall be sold within a reasonable time thereafter by Plaintiff at either public or private sale as Plaintiff may deem best, and the net proceeds received from said sale, after payment of all costs and expenses involved in said sale, shall be retained by Plaintiff and credited against the Judgment rendered herein in favor of Plaintiff against Defendants. Provided, however, that before any sale of said equipment is made at either public or private sale, Plaintiff shall give notice in writing of said sale or proposed sale at least ten (10) days before the time of the sale to Defendants. Said notice shall be mailed to each of Defendants at 250 North Canon Drive, Beverly Hills, California.

5. Defendants are obligated to and shall indemnify and hold Plaintiff harmless from any and all claims, demands and liabilities of every nature arising out of the assembling, removal and delivery of the equipment listed in paragraph 3 above to Plaintiff as directed herein.

6. All provisions of this Default Order and Judgment may be enforced in this Court

by appropriate action by Plaintiff to hold defendants, and each of them, in contempt of this Court for any violations of this Order and Judgment.

_____
JUDGE

The foregoing Order and Judgment may be entered and service of a copy and notice of entry thereof are hereby waived.

This Order and Judgment was prepared by

STOLL, KEENON & PARK
310 First National Bank Building
Lexington, Kentucky

By /s/ Keenon
ATTORNEYS FOR PLAINTIFF

and the same has been seen and approved by:

WHITE, McCANN & STEWART
Attorneys at Law
Codell Building
Winchester, Kentucky

By /s/ M. McCann
ATTORNEYS FOR DEFENDANTS

APPENDIX F

CLARK CIRCUIT COURT

ARKANSAS LOUISIANA FINANCE CORPORATION, a corporation, PLAINTIFF

VS. COMPLAINT No. #11463

TOM ATKINS LINE CO., LTD., (d/b/a "MOAR LINE CO., LTD."), a limited partnership comprised of Martin Melcher and J. B. Rosenthal as limited partners and T. E. Atkins as the general partner; TOM ATKINS PRODUCING CO., LTD., (d/b/a "MELCHER-ATKINS OIL"), a limited partnership comprised of Martin Melcher and J. B. Rosenthal as limited partners and T. E. Atkins as the general partner, and MARTIN MELCHER, J. B. ROSENTHAL and T. E. ATKINS, individually, DEFENDANTS

* * * * * * * * *

Plaintiff, ARKANSAS LOUISIANA FINANCE CORPORATION, a corporation, states that the following facts are true:

1. Under a certain contract and security agreement, dated February 2, 1965, Arkla Ingersoll Co., a division of Arkla Industries, Inc. (herein referred to as "Arkla") sold certain items of equipment listed in said contract to MOAR LINE CO., LTD., which is

an assumed name for TOM ATKINS LINE CO., LTD., a limited partnership comprised of Martin Melcher and J. B. Rosenthal as limited partners and T. E. Atkins as the general partner (said purchaser being referred to as "MOAR"). Said equipment so sold by Arkla to Moar is listed in full on Exhibit "A" to Exhibit "1" hereto. For good and valuable considerations which are set forth in said contract and security agreement, TOM ATKINS LINE CO., LTD. (d/b/a/ "MOAR LINE CO., LTD."), a limited partnership comprised of Martin Melcher and J. B. Rosenthal, as limited partners, and T. E. Atkins, as the general partner, TOM ATKINS PRODUCING CO., LTD. (d/b/a "MELCHER-ATKINS OIL"), a limited partnership comprised of Martin Melcher and J. B. Rosenthal, as limited partners, and T. E. Atkins, as the general partner, and MARTIN MELCHER, J. B. ROSENTHAL and T. E. ATKINS, individually, (all hereinafter referred to collectively as "Melcher-Rosenthal-Atkins Interests"), agreed and promised to pay to Arkla for said equipment the sum of Ninety-one Thousand Five Hundred ($91,500.00) Dollars. Also pursuant to said contract and security agreement, Arkla loaned to Moar the sum of Eight Thousand Five Hundred ($8,500.00) Dollars in cash and Melcher-Rosenthal-Atkins Interests agreed and promised to repay the whole of said two sums, in the aggregate amount of $100,000.00, together with interest on the unpaid principla balances due thereon from time to time at the rate of seven (7%) percent per annum from February 2, 1965, until paid. Pursuant to paragraph 5 of said contract and

security agreement, the entire principal and all interest on said indebtedness was to be paid in full on or before February 2, 1968. Payments have been made and applied on the principal and interest of said debt from time to time, and there is now due and owing on said debt the following:

a) A principal sum of $99,050.37, together with interest thereon at the rate of seven (7%) percent per annum from December 31, 1967, until paid;

b) Accrued and unpaid interest on said debt to December 31, 1967, in the sum of $7,185.59.

On February 2, 1965, all right, title and interest of Arkla in and to said contract and security agreement was assigned by Arkla to Plaintiff, which is now and has been at all times since February 2, 1965, the owner and holder of said debts and all other rights reserved in favor of Arkla under said contract and security agreement. A complete copy of said contract and security agreement, and the assignment of the same from Arkla to Plaintiff, is attached and made a part hereof, marked Exhibit "1" for purposes of identification. The unpaid balances of principal and interest set forth above were not paid on or before February 2, 1968, the same have not been paid to date, and pursuant to said contract and security agreement, Plaintiff is entitled to have the Court adjudge that Defendants, and each of them, are now indebted to Plaintiff in the principal sum

of $99,090.37, together with interest thereon at the rate of seven (7%) percent from December 31, 1967, until paid, plus accrued and unpaid interest to December 31, 1967, on the principal of said debt, in the sum of $7,185.59.

2. Under paragraph 4 of Exhibit "1" hereto, and the assignment to Plaintiff attached thereto, there was assigned to Plaintiff, and it is now the owner of 12.375 percent of the gross proceeds payable by United Fuel Gas Company under the United Fuel Gas contract referred to in Exhibit "1", and Plaintiff is entitled to have the Court adjudge that Plaintiff is entitled to have said percentage of said proceeds paid to it by United Fuel Gas Company until the aforesaid indebtedness to Plaintiff is fully paid.

3. Under paragraph 6 of Exhibit "1" hereto and the assignment to Plaintiff attached thereto, and until all of the aforesaid indebtedness is paid to Plaintiff, (a) Plaintiff is the owner of the title in and to all of said equipment described in Exhibit "1", and (b) Plaintiff is the holder of a security interest in all contract rights owned by the Melcher-Rosenthal-Atkins Interests, or any of them, under the United Fuel Gas contract referred to in Exhibit "1" hereto. Defendants have defaulted in the payment of the aforesaid indebtedness as required by Exhibit "1" hereto, and under paragraph 6 (b) of Exhibit "1" hereto Plaintiff is entitled to remove said equipment on which it holds title and a security interest pursuant to Exhibit "1", and to have the Court adjudge that Defendants are obligated to indemnify

Plaintiff for any claims asserted by reason of said removal and to hold Plaintiff harmless from and against all claims, demands and liabilities arising out of such removal. Upon removal of said equipment by Plaintiff, and upon the giving of notice, in writing, to Defendants at 250 North Canon Drive, Beverly Hills, California, ten (10) days in advance of any sale, then, under paragraph 8 of Exhibit "1", Plaintiff is entitled to sell said equipment at either public or private sale, and to apply the proceeds therefrom, after the payment of all costs and expenses of the sale or sales, to the aforesaid indebtedness of Defendants to Plaintiff.

4. Paragraph 3 of Exhibit "1" provides that in the event of the default of Defendants making payment of the entire indebtedness due Plaintiff on February 2, 1968, Plaintiff is entitled to recover from Defendants a reasonable attorney's fee for collection of said indebtedness. Pursuant thereto, Plaintiff states that it is entitled to have the Court adjudge that Defendants, and each of them, are indebted to Plaintiff for a reasonable attorney's fee in the collection of said indebtedness.

WHEREFORE, Plaintiff prays as follows:

A) That the Court adjudge and determine that Defendants, and each of them, are indebted to Plaintiff in the principal sum of $99,090.37, together with interest thereon at the rate of seven (7%) percent per annum from December 31, 1967, until paid, plus accrued and unpaid interest to December 31, 1967, on the principal of said debt

in the sum of $7,185.59, and for personal judgment in said amounts against each Defendant who is personally served with summons herein; and

B) That the Court adjudge that Plaintiff is the owner of all rights retained by Arkla in the contract and security agreement, a copy of which is attached and marked Exhibit "1" hereto; and

C) That the Court adjudge that Plaintiff is the owner of 12.375 percent of the gross proceeds payable by United Fuel Gas Company under the United Fuel Gas contract referred to in Exhibit "1", and that Plaintiff is entitled to have said percentage of said proceeds paid to it by United Fuel Gas Company until the indebtedness to Plaintiff set forth above is fully paid.

D) That the Court adjudge that until all of the aforesaid indebtedness to Plaintiff is paid in full, (1) Plaintiff is the owner of the title in and to all of the equipment listed and described on Exhibit "A" to Exhibit "1" hereto, and (2) Plaintiff is the holder of a security interest in all contract rights owned by all Defendants, or any of them, under the United Fuel Gas contract referred to in Exhibit "1" hereto; and

E) That the Court adjudge that Defendants have defaulted in the payment of the aforesaid indebtedness as required by Exhibit "1" hereto, and that under the provisions of Exhibit "1" hereto, Plaintiff is entitled to remove

the equipment listed on Exhibit "A" to Exhibit "1" hereto from the premises where the same is now installed, and to sell the same at either private or public sale, upon giving notice of said sale at least ten (10) days prior to such sale to Defendants at the address set forth in paragraph 8 of Exhibit "1" hereto, and to apply the proceeds of such sale to the payment of the aforesaid indebtedness to Plaintiff, after the payment of all costs and expenses of such sale or sales; and

F) That the Court adjudge that Defendants, and each of them, shall indemnify and hold Plaintiff harmless from any and all claims, demands and liabilities arising out of such removal of said equipment from the premises where the same is now installed; and

G) That the Court adjudge that Defendants, and each of them, are indebted to Plaintiff for a reasonable attorney's fee for collection of the aforesaid indebtedness, and that the Court fix the amount of said fee herein, and award a personal judgment in said amount against all Defendants who are personally served with summons herein; and

H) For its costs herein expended, and for all proper relief to which it may appear entitled.

STOLL, KEENON & PARK
310 First National Bank Building
Lexington, Kentucky 40507

By /s/ Kennon
Attorneys for Plaintiff

ARK-L.A. Finance Corporation VS.
J. B. ROSENTHAL

STATE OF CALIFORNIA, County of Los Angeles
No. C 961 867

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original DEFENDANT'S EXHIBIT "B"

on file and of record in my office, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court.

Dated: April 10, 1972

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By /s/ B. McGowan, Deputy

APPENDIX G

December 17, 1971

Honorable Edwin Jefferson, Presiding Justice
Court of Appeal of the State of California
Second Appellate District, Division Four
217 West First Street
Los Angeles, California 90012

Re: Arkansas Louisiana Finance Corporation v. J. B. Rosenthal, No. 38062
(Argued December 17, 1971)

Dear Mr. Presiding Justice:

Upon return to my office I encountered a decision which was reported today for the first time in the Daily Journal Weekly Supplement, and which is sufficiently pertinent to the above entitled case - now under submission - as to make it encumbent upon me to bring it to the court's attention: Promotus Enterprises, Inc. v. Jiminez, filed on November 26, 1971, First App. Dist.

That case states that "In order for [an] appearance to be effectual, in the absence of service of process, it must be with knowledge that there is an action pending and with the intention to appear therein." The case further notes that, as in Fazzi v. Peters, 68 Cal. 2d 590, where a complaint fails to set forth an action against a partner individually, the judgment is void as to such an individual.

In the case at bench the complaint for personal judgment is only stated to be made "against each defendant who is personally served with summons herein."

Since Rosenthal was never served with a summons, any appearance by McCann in Kentucky, even if he were authorized, is completely ineffectual; there was at no time a de jure action set forth against Rosenthal. Any act of McCann's was therefore a nullity in regard to the liability of Rosenthal individually, under the principle of Promotus Enterprises.

Expressed in another manner, because the explicit condition precedent of service, which plaintiff chose to include in its prayer for relief in Kentucky was never met, there could never be valid judgment against Rosenthal. This is true regardless of whether or not he read the complaint. The only way this defect could be cured would have been for plaintiff to amend its complaint or serve the summons. This having not been done, Rosenthal would be entitled to rely on the well-known rule that a court, in a default case, cannot award relief in excess of that prayed for in the complaint. There could not be an "effectual" appearance as required in Promotus Enterprises.

The Kentucky court, bound by the complaint pleaded by plaintiff, therefore acted in excess of jurisdiction and its judgment was void.

Respectfully submitted,
PAUL S. SIGELMAN

PSS:se
cc: Donald F. Yokaitis, Esq.
William G. Sharp